No. 98-456

In the Supreme Court of the United States

OCTOBER TERM, 1998

JOE BOEHMS, PETITIONER

v.

CRAVEN CROWELL, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether 29 U.S.C. 633a (1994 & Supp. II (1996)) authorizes an award of backpay for the period following a federal employee's retirement from federal service.

2. Whether Section 633a authorizes an award of attorney's fees to successful claimants.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. i-xx) is reported at 139 F.3d 452. The May 15, 1996 (Pet. App. xxi-xxvi), October 1, 1996 (Pet. App. xxvii-xxix), and December 20, 1996 (Pet. App. xxx) orders of the district court are unreported.

JURISDICTION

The judgment of the court of appeals was entered on April 15, 1998. A petition for rehearing was denied on June 12, 1998. Pet. App. xxxi-xxxii. The petition for a writ of certiorari was filed on September 10, 1998. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner is a former employee of the Tennessee Valley Authority (TVA), a corporate agency of the United States. See generally *Ashwander* v. *TVA*, 297 U.S. 288, 315 (1936); Pet. App. xviii. In April 1991, TVA reorganized its Customer Group, transforming its 15 district offices into 13 customer service centers (CSCs). Under the reorganization, each CSC was headed by a CSC manager, assisted, at the top of the organizational hierarchy, by an operations manager and a marketing manager. Petitioner, who was then 55 years old and had been manager of TVA's Tupelo district office for approximately three years before the reorganization, applied for the CSC manager position at the Tupelo CSC after the reorganization. In January 1992, petitioner's supervisor informed him that another employee, who was then 32 years old, had been selected for that position, but that petitioner could have the job of operations manager. If petitioner had taken that job, he would have continued earning an annual salary (approximately $70,000) identical to the salary he had earned as district manager. Pet. App. ii-iii, x; Stipulation of Facts (Stip.) ¶ 8.

Petitioner considered the offer a demotion and did not accept it. Because his existing job was being eliminated in the reorganization, he enrolled in TVA's Employee Transition Program (ETP), which allowed him to remain on the TVA payroll for up to six months while he looked for suitable alternative employment, both within and outside of TVA. During that period, petitioner twice rejected offers for the CSC operations manager position at the center in West Point, Mississippi, and he refused to entertain similar positions advertised at other offices. No CSC manager position be-

came available, and no other employment opportunities arose that petitioner found satisfactory. In November 1992, petitioner was "reduced in force," and, invoking his retirement privileges, he became eligible to receive federal retirement benefits. See Pet. App. iii-iv, xiii-xiv; see also Boehms C.A. Br. 30 (noting petitioner's receipt of "retirement benefits").

2. On May 19, 1992, several months after his non-selection for the CSC manager's position but nearly six months before his retirement, petitioner filed an administrative complaint with TVA. He alleged that his nonselection was based on age and that it violated the provisions of the Age Discrimination in Employment Act (ADEA) applicable to federal employment. See 29 U.S.C. 633a (1994 & Supp. II 1996). After failing to obtain administrative relief, petitioner filed suit under Section 633a in district court. That court found that petitioner was denied the manager's position because of his age, in violation of Section 633a (Pet. App. xxii-xxv), and it granted him a backpay award for the period between his nonselection on January 15, 1992 and his retirement on November 13, 1992 (*id.* at xxviii). The court rejected petitioner's request for additional backpay beyond the date of his retirement on the ground that such relief is available only when an employee is "constructively discharged," a claim that petitioner could not make here. *Id.* at xxvii. The district court then granted petitioner attorney's fees, even though it acknowledged that many courts "have refused to order the recovery of attorney's fees against federal defendants" in cases arising under Section 633a. *Id.* at xxviii.

3. The court of appeals affirmed on the issues of liability and damages but vacated the award of attorney's fees. Like the district court (Pet. App. xxv-

xxvi), the court of appeals rejected TVA's argument that, by declining offers of employment as a CSC operations manager, petitioner had failed to "mitigate damages" during the period in which he was enrolled in the ETP. The court thus upheld the district court's award of backpay for the entire period leading up to petitioner's retirement. *Id.* at ix-xii.

The court separately upheld the district court's refusal to grant additional backpay for the period following that retirement. Relying on its earlier decision in *Jurgens* v. *EEOC*, 903 F.2d 386 (5th Cir. 1990), the court reaffirmed that, to be eligible for such an award, the employee must demonstrate that he had been "constructively discharged" from his job. Pet. App. xiii. Petitioner, the court held, could make no such showing: "When he chose to retire from TVA, [petitioner] had, at the very least, an offer to remain as Tupelo CSC [operations] manager at the same salary he had been earning as district manager. In addition, several district managers other than [petitioner] accepted positions as CSC operations managers pursuant to TVA's agency-wide reorganization." *Id.* at xiv. The court concluded that, because acceptance of such a position would plainly not have been "so intolerable that a reasonable person would have felt compelled to resign," petitioner could not claim constructive discharge and therefore could not recover post-retirement backpay. *Ibid.*

Finally, the court rejected petitioner's claim that he was entitled to attorney's fees directly under Section 633a. The court held that, as distinguished from the provisions of the ADEA applicable to private-sector age discrimination (see 29 U.S.C. 626(b)), Section 633a contains no provision authorizing such a fee award. Although Section 633a(c) does authorize a district court to provide "such legal and equitable relief as will ef-

fectuate the purposes" of the ADEA, the court followed the First Circuit's decision in *Nowd* v. *Rubin*, 76 F.3d 25 (1996), in holding that Section 633a(c) does not "overcome either the doctrine of sovereign immunity or the so-called American Rule of attorney's fees." Pet. App. xvi. The court remanded the case, however, for a determination as to whether petitioner might nonetheless be entitled to attorney's fees under the Equal Access to Justice Act, 28 U.S.C. 2412(b). Pet. App. xvii.

DISCUSSION

1. Petitioner first challenges (Pet. 7-8) what he characterizes as the court of appeals' holding "that a failure to reasonably mitigate damages cuts off all backpay regardless of whether reasonable mitigation could equal complete mitigation of lost wages." Pet. 7. That challenge is difficult to understand. Rejecting TVA's arguments to the contrary, the court of appeals held that petitioner *had* "mitigated damages"—even though he persistently rejected offers of employment at the same salary he had received before TVA's 1991 reorganization—and that he was therefore entitled to full backpay for the entire period preceding his voluntary retirement from federal service. See Pet. App. ix-xii. For that reason, petitioner's arguments concerning "mitigation" (Pet. 7-8)—the subject of the first two questions presented in the petition (Pet. 1)—are largely irrelevant to the proper disposition of this case.

Petitioner appears to have conflated two quite different issues arising under the provisions of the ADEA specific to federal employment (29 U.S.C. 633a (1994 & Supp. II 1996))[1]: whether a federal employee

[1] "[S]ection 633a is a self-contained provision applicable exclusively to ADEA claims against public sector employers." *Nowd* v. *Rubin*, 76 F.3d 25, 27 (1st Cir. 1996); see 29 U.S.C. 633a(f). In

alleging violations of those provisions has reasonably mitigated damages during periods for which he would otherwise be entitled to backpay, and whether that employee is entitled to backpay for the period following his voluntary retirement from federal service. Because petitioner prevailed on the first issue in the court of appeals, only the second is presented here. And, with respect to that issue, the court of appeals correctly held that petitioner was ineligible for backpay for the period following his retirement because he could not plausibly claim that he had been "constructively discharged." Pet. App. xiii-xiv (following *Jurgens* v. *EEOC*, 903 F.2d 386 (5th Cir. 1990)).

The court of appeals' factbound determination that petitioner had not been constructively discharged sharply distinguishes this case from the private-sector employment cases from other courts of appeals that petitioner mistakenly characterizes (Pet. 7-8) as conflicting with the decision below. Those cases, unlike this one, *did* involve either a constructive discharge or an outright dismissal.[2] Whereas involuntary termination

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enacting Section 633a as an amendment to the ADEA, "Congress chose to create a separate and discrete federal remedial scheme rather than subsume [federal] employees under the pre-existing enforcement procedures in the private sector." *Lewis* v. *Federal Prison Indus., Inc.*, 953 F.2d 1277, 1283 (11th Cir. 1992). See generally *Lehman* v. *Nakshian*, 453 U.S. 156, 160-161 (1981).

[2] See *Booker* v. *Taylor Milk Co.*, 64 F.3d 860 (3d Cir. 1995) (claim of racially motivated discharge under Title VII of the Civil Rights Act of 1964, see 42 U.S.C. 2000e-5(g)(1)); *Syvock* v. *Milwaukee Boiler Mfg. Co.*, 665 F.2d 149, 159-160 (7th Cir. 1981) (claim of discriminatory layoff and refusal to rehire under private-sector provisions of ADEA), overruled on other grounds by *Coston* v. *Plitt Theatres, Inc.*, 860 F.2d 834 (7th Cir. 1988); *Cassino* v. *Reichhold Chems., Inc.*, 817 F.2d 1338 (9th Cir. 1987) (claim of discriminatory firing under private-sector provisions of ADEA), cert.

is *itself* often the basis for a discrimination claim (subject to a duty to mitigate post-termination damages), voluntary retirement of the kind at issue here gives rise to no such claim.[3] Moreover, contrary to petitioner's suggestion (Pet. 9-10), there is nothing anomalous about the rule entitling a federal employee to collect backpay from the government for the period during which he remained in federal service, but not for the period following his voluntary retirement, during which he performs no work for the government and becomes eligible for federal retirement benefits. Indeed, petitioner's contrary interpretation of Section 633a would conflict with the principle that "a waiver of the Government's sovereign immunity will be strictly construed, in terms of its scope, in favor of the sovereign." *Lane* v. *Peña*, 518 U.S. 187, 192 (1996); see, *e.g.*, *Lehman* v. *Nakshian*, 453 U.S. 156, 160-161 (1981); *Library of Congress* v. *Shaw*, 478 U.S. 310 (1986).

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denied, 484 U.S. 1047 (1988); *Brady* v. *Thurston Motor Lines, Inc.*, 753 F.2d 1269 (4th Cir. 1985) (claim of racially discriminatory discharge under Title VII); *EEOC* v. *Delight Wholesale Co.*, 973 F.2d 664 (8th Cir. 1992) (claim of gender-based constructive discharge under Title VII); see also *Ford Motor Co.* v. *EEOC*, 458 U.S. 219, 231 (1982) (interpreting duty to mitigate under 42 U.S.C. 2000e-5(g) in Title VII case involving discriminatory refusal to hire).

[3] The petition does not present, and petitioner has not preserved, any claim of constructive discharge. See, *e.g.*, Stip. ¶ 6 (confirming that administrative complaint underlying these proceedings was filed in May 1992, several months before petitioner's retirement). Like the district court (Pet. App. xxii, xxviii), the court of appeals determined, on the facts of this case, that petitioner's departure from government service was a voluntary retirement, despite the characterization of that retirement as a "reduc[tion] in force." See *id.* at xiii-xiv; see also *id.* at iv. That determination was factbound and correct.

2. The third question presented in the petition is whether "a successful age discrimination plaintiff [is] entitled to seek an award of attorney['s] fees" in cases arising under Section 633a. Pet. 1; see Pet. 11. As an initial matter, this case would be an odd vehicle for this Court's consideration of that issue. The court of appeals held that, even though Section 633a does not itself authorize an award of attorney's fees, the Equal Access to Justice Act, 28 U.S.C. 2412(b) (EAJA), might nonetheless support such an award in this case, and it remanded to the district court for further consideration of the issue. See Pet. App. xv-xviii. Petitioner neither mentions that remand order nor explains why, in these circumstances, any fee award under EAJA would be inadequate.

In any event, the court of appeals was correct in holding that Section 633a does not itself support awards of attorney's fees. Waivers of the government's sovereign immunity must be unequivocally expressed, and courts should "not enlarge the waiver 'beyond what the language requires.'" *Library of Congress*, 478 U.S. at 318 (quoting *Ruckelshaus* v. *Sierra Club*, 463 U.S. 680, 685 (1983)). As distinguished from the provisions of the ADEA applicable to the private sector (see, *e.g.*, 29 U.S.C. 626(b)), Section 633a contains no authorization for such awards. See generally 29 U.S.C. 633a(f); *Lewis*, 953 F.2d at 1283. And, as the court of appeals explained, "the generalized language" of Section 633a(c), which authorizes only "such legal and equitable relief as will effectuate the purposes" of the ADEA, "cannot be interpreted as * * * an *unequivocal* waiver of the government's sovereign immunity *vis a vis* awards of attorney's fees." Pet. App. xvii (citing *Nowd* v. *Rubin*, 76 F.3d 25, 27 (1st Cir. 1996)). Petitioner's claim is also independently foreclosed by the

so-called American Rule of attorney's fees: that, in the absence of an express statutory authorization to the contrary, litigants must pay their own such fees. *Id.* at xvi-xvii (citing *Nowd*, 76 F.3d at 27).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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